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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRIS ANTHONY GEORGE,

Defendant and Appellant.

E059313

(Super.Ct.No. RIF1203066)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner,
Judge. Affirmed as modified.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, William M. Wood and Paige B.
Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Jane Doe,¹ age 13, after drinking with friends, went to an abandoned house where she passed out, and awoke the next morning with her pants and underwear removed. A sexual assault examination revealed she had been raped, and subsequent investigation of the abandoned house led to the discovery of used condoms containing the DNA from Jane Doe and three perpetrators, one of whom was Chris George, the defendant. Defendant was charged and convicted of rape of an unconscious person (Pen. Code, § 261, subd. (a)(3), count 1),² lewd act with a child under 14 (§ 288, subd. (a), count 2), and active participation in a criminal street gang (§ 186.22, subd. (a), count 3). The jury also made true findings as to enhancements to the rape and lewd act convictions that the crimes were committed for the benefit of a criminal street gang. Defendant was sentenced to an aggregate term of 18 years, 4 months and appealed.

On appeal, defendant argues (1) the evidence is insufficient to support the true findings on the gang enhancements to counts 1 and 2; (2) the evidence is insufficient to support the conviction for active participation in a criminal street gang (count 3); (3) imposition of a consecutive term on count 1 violated the prohibition against multiple punishment (§ 654); and (4) imposition of a consecutive term for count 3 violated the prohibition against multiple punishment (§ 654). We affirm the true findings but modify the sentence to stay the term for count 3, and remand for resentencing on counts 1 and 2.

¹ Although the victim's first name was used at the trial, for reasons of protective nondisclosure, we will refer to her as Jane Doe.

² All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

On November 19, 2010, Jane Doe, age 13, went to a park to hang out and drink Alize, an alcoholic beverage, with some friends. Jane Doe drank an entire bottle of Alize.³ At some point, some African-American males met up with Jane Doe and her friends at the park. These males invited Jane Doe and her group to go to a house. Jane Doe was so intoxicated that she could not recall what happened at that house after she entered and sat on the floor. Her best estimate is that the group went to the house at some time around or before midnight.

The next morning, Jane Doe woke up vomiting. She was upstairs in the house to which she had been taken the night before, but her shoes and pants had been removed. Jane Doe put her pants on and walked outside to look for help, although she could barely walk. She walked down the street and knocked on the door of a house. The occupant of the house to which Jane Doe went contacted the Riverside Sheriff's Office to report a possible rape. Jane Doe was transported to a county hospital.

At the hospital, Jane Doe was examined by a Sexual Assault Response Team (SART) nurse. The nurse noted dried secretions on Jane Doe's pants and that she complained of tenderness. Jane Doe also complained of tenderness to the right side of her head, explaining it felt like she had been hit. The nurse found an abrasion and a laceration at the six o'clock position of Jane Doe's vaginal opening. The nurse collected

³ Jane Doe testified that the members of her group drank "Alize" but it appears she was referring to Alizé, a cognac-based fruit-flavored line of alcoholic beverages. (See, <http://www.alize.ch/> as of September 30, 2014.)

swabs from Jane Doe's external genitalia, as well as from secretions found in the vaginal vault. The nurse also took a blood sample.

Jane Doe's blood was tested by a criminalist at the Department of Justice (DOJ) and was found to contain 0.04 percent alcohol. Using the rate of elimination of alcohol, the criminalist determined that at midnight, Jane Doe's blood alcohol would have been 0.32 percent, and that 10:00 p.m., it would have been 0.36 percent. Some people have physical impairment or even lose consciousness at 0.23 percent. At 0.36 percent, a person would experience lack of motor control, vision issues, and some people have fallen into a coma at that level.

On November 23, 2010, Sergeant Flores and another detective from the sheriff's office interviewed Jane Doe at her residence. The detectives asked if they could take her down the street to a house. Jane Doe identified the residence where the rape occurred. The next day, Flores and another detective went back to the house. No one responded when they knocked at the door, so they entered the house, which was vacant. Inside, to the side of the door, the detectives saw a condom and searched the rest of the house. Upstairs, the detectives found a white tube sock and condom wrappers in the hallway, and in the southeast bedroom of the house, they found sneakers that matched the description of Jane Doe's shoes. In one bathroom, they found a used condom, and in the toilet tank in the master bedroom, they found two condoms and a condom wrapper.

The condoms found in the back of the toilet were taken as evidence and tested. The Riverside County Sheriff's Department forensic technician found the DNA of Ural

Gamble⁴ in one of the condoms found in the back of the toilet tank, and found the DNA of Chaz MacFalling on the vulva swab taken during the SART examination of Jane Doe. A Department of Justice criminalist examined another condom and found DNA which matched a buccal swab taken from the defendant, as well as DNA from Ural Gamble. The interior and exterior of the other condom taken from the toilet tank had female DNA matching Jane Doe's, and male DNA matching defendant.

Defendant was charged with rape of an intoxicated person (§ 261, subd. (a)(3), count 1), and lewd acts with a person under the age of 14 (§ 288, subd. (a), count 2). It was further alleged in connection with both counts 1 and 2 that the crimes were committed for the benefit or at the direction of a criminal street gang (§ 186.22, subds. (b)(1)(B) [count 1], and (b)(1)(C) [count 2]). Defendant was also charged with active participation in a criminal street gang (§ 186.22, subd. (a), count 3). Defendant was tried by a jury.

During trial, a gang detective testified as an expert on two Moreno Valley gangs, the Edgemont Criminals and Dorner Block. Members of Edgemont-Dorner Block may have a tattoo of the letter "D" for the Detroit Tigers, the Cleveland Indian image, for the intersection of Dorner and Indian Streets in Moreno Valley that was a founding point of the Dorner Block gang, or the letter "A" with a halo, the icon of the Anaheim Angels,

⁴ Ural Gamble and Chaz MacFalling were originally charged in this case along with defendant, but they pled guilty prior to defendant's trial. Gamble is also referred to as "Earl" in some places.

which stands for Adrian and Allies, another intersection in Moreno Valley. They may also have a tattoo of the letters “MOB,” which stands for Mont or Block, two gangs.

The expert testified that members of Edgemont-Dorner Block wear the color red and use three different hand signs, because the gang was an amalgamation of three different gangs. One hand sign signifies the letter “E” for Edgemont, another signifies the letter “D” for Dorner Block, and the third resembles the letter “Y” for the third gang that came together with Edgemont-Dorner Block. One photograph of defendant showed him giving the “E” sign for Edgemont, while another photograph showed defendant with two other gang members flashing a “D” with his right hand, and an “E” with his left hand.

The expert testified that defendant admitted membership in the Edgemont-Dorner Block gang in 2007, 2008 and 2011. Defendant was documented approximately 15 times in Edgemont’s territory and had a tattoo of the Angel’s “A” as well as “MOB.” Ural Gamble was an admitted member of Edgemont-Dorner Block, and based on tattoos and an arrest while in the company of Gamble and another gang member, the expert formed the opinion that Chaz MacFalling was also a member of Edgemont-Dorner Block.

In the expert’s opinion, defendant was an active gang member at the time of the rape. The expert was also of the opinion that the rape of an intoxicated girl by three gang members is a gang related crime, committed to promote the gang.

The jury convicted defendant of all counts, and found true all special allegations. The court sentenced defendant as follows: for count 2, the principal term, the court imposed the low term of 3 years, with a 10 year consecutive term for the gang

enhancement. The low term of 3 years for count 1 was ordered to run consecutive to count 2, at full strength, plus one-third the midterm enhancement (5 years) for a consecutive term of 1 year, 8 months. For count 3, the court imposed a consecutive term of 8 months, one-third the midterm. Defendant appealed.

DISCUSSION

1. *There is Substantial Evidence to Support the Jury's Findings as to the Gang Enhancements.*

Defendant argues the evidence was insufficient to support the jury's true findings on the gang enhancements alleged respecting counts 1 and 2. Specifically, he argues that there was insufficient evidence that (1) the crime was committed for the benefit of a street gang because the victim did not know the defendant and his associates were gang members and did not know what had been done to her, and (2) defendant had specific intent to promote, further or assist criminal conduct by gang members. We disagree.

We assess the sufficiency of evidence by reviewing the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also, *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320 [99 S.Ct. 2781, 61 L.Ed.2d 560].) If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Veale* (2008) 160 Cal.App.4th 40, 46, [Fourth Dist., Div. Two], citing *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We review the sufficiency of the evidence to support an

enhancement using the same standard we apply to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; see also, *People v. Albillar* (2010) 51 Cal.4th 47, 59-60 [gang enhancement] (*Albillar*).)

Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. Count 1 alleged an enhancement pursuant to subdivision (b)(1)(B) of section 186.22, which provides for additional punishment by a term of five years. Count 2 alleged an enhancement pursuant to subdivision (b)(1)(C), which provides for additional punishment of 10 years.

To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. (§ 186.22, subd. (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 319-320; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1399-1400.)

The gang enhancement comprises two prongs: The first prong requires proof that the charged offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang. Expert opinion that particular criminal conduct benefited a gang is admissible, and can be sufficient to support the gang enhancement. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048-1049.) The second prong requires evidence that the charged sex offense offenses were committed with the specific intent to

promote, further, or assist other criminal conduct by members of the gang. (*Albillar, supra*, 51 Cal.4th at p. 51.)

As to the first prong, the court in *Albillar* acknowledged that not every crime committed by gang members is related to a gang, but held that in the case before it the crimes were gang-related in two ways: they were committed in association with the gang, and they were committed for the benefit of a gang. (*Albillar, supra*, 51 Cal.4th at p. 60.) There, the expert's opinion that the criminal conduct benefitted the gang by enhancing its reputation by establishing that the defendants came together *as gang members* to attack the victim and was sufficient to provide they committed the crimes in association with the gang. (*Id.* at p. 62.) Additionally, relying on the gang expert's opinion that particular criminal conduct benefitted the gang by enhancing its reputation for viciousness was sufficient to show that the defendant's criminal attack benefitted the gang. (*Id.* at pp. 63-64.)

In *Albillar*, three defendants, all gang members, raped a 15-year old girl by force, in concert. The three defendants appealed, challenging the sufficiency of the evidence to support the substantive gang offense, as well as the gang enhancements. The California Supreme Court held that the testimony of the gang expert that the commission of a rape in concert by three gang members satisfied the first prong of section 186.22, subdivision (b)(1).

Contrary to defendant's assertion, the same is true in the present case, where the expert testified that the crime was gang-related because defendant committed it in association with other gang members, and because the crime enhanced the gang's

reputation. The fact that Jane Doe was unconscious at the time does not affect this determination as there is no requirement that a particular victim be consciously aware that she is the victim of a gang-related crime to support the enhancement.

As to the second “prong” of the gang enhancement, relating to the defendant’s specific intent to promote, further, or assist in any criminal conduct by gang members, the commission of a crime in concert with other gang members is substantial evidence supporting the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322, citing *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

The Supreme Court agreed with this reasoning in *Albillar, supra*, 51 Cal.4th at page 66. In *Albillar*, the court concluded that the scienter requirement of section 186.22, subdivision (b)(1) applies to *any* criminal conduct, without a further requirement that the conduct be “apart from” the criminal conduct underlying the offense of conviction sought to be enhanced. (*Albillar*, at p. 66.) The court also concluded that there is no requirement that the defendant act with the specific intent to promote, further, or assist a *gang*; there is only a requirement that the defendant have specific intent to promote, further, or assist criminal conduct by *gang members*. (*Id.*, at p. 67.) As to the defendants in that case, the Supreme Court concluded that if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members. (*Id.*, at p. 68.)

The present case is similar to *Albillar*, involving the rape of a 13-year old victim by three gang members. As to the second prong, the fact that the defendant committed the crime with known members of the gang (Gamble and MacFalling) supported the jury's finding that the defendant had the specific intent to promote, further, or assist the criminal conduct of those other gang members involved in the rape, satisfying the element of scienter necessary to prove the enhancement.

The fact that Jane Doe had no specific knowledge of what happened to her or who did them is irrelevant: there was ample circumstantial evidence (DNA from both Jane Doe and the three men found on and in used condoms is fairly convincing circumstantial evidence) that three men penetrated her vagina wearing condoms. This evidence supported the jury's verdict that the crimes of rape and lewd conduct were committed by defendant, and that he committed the crimes in association with and for the benefit of a criminal street gang, with the specific intent of promoting, furthering, or assisting the sexual offenses of the other two gang members involved in Jane Doe's assault.

2. *There is Substantial Evidence to Support the Conviction for Active Participation in a Criminal Street Gang.*

Defendant argues there is insufficient evidence to support the conviction for active participation in a criminal street gang, pursuant to section 186.22, subdivision (a). Specifically, defendant argues that there is insufficient evidence he was acting in concert with other members of Edgemont Criminals at the time of the offenses. We disagree.

Section 186.22, subdivision (a), provides that any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged

in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished as a felony or misdemeanor. Thus, the elements of the crime are (1) active participation in a criminal street gang, that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*); see also, *People v. Lamas* (2007) 42 Cal.4th 516, 523.)

To establish that a defendant actively participated in a criminal street gang, it is not necessary to prove that a defendant had a specific intent to further or promote the gang, only knowledge of the gang's pattern of criminal activity. (*Albillar, supra*, 51 Cal.4th at p. 56.) Further, section 186.22, subdivision (a) does not require that the underlying felony be gang related. (*Albillar, supra*, at p. 55.) However, the crime of active participation under section 186.22, subdivision (a) punishes persons who acted in concert with other gang members in committing a felony, regardless of whether such felony was gang related. (*Rodriguez, supra*, 55 Cal.4th at p. 1138.) In other words, the statute punishes active participants for commission of criminal acts done *collectively* with gang members. (*Id.*, at p. 1139.)

The first element (active participation) is shown if the defendant had more than nominal or passive involvement with the gang at or near the time he was charged with the offense of active gang participation. (*Rodriguez, supra*, 55 Cal.4th at p. 1134; *People v. Castenada* (2000) 23 Cal.4th 743, 747.) The second element (knowledge that the gang's

members engage in a pattern of criminal gang activity) can be established by evidence of defendant's gang paraphernalia (*People v. Jasso* (2012) 211 Cal.App.4th 1354, 1377-1378), or by expert testimony that information about a gang's current activities is available only to other active gang members. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1502.) Defendant does not direct his challenge to either of these elements, so we do not need to address them.

Instead, defendant challenges the third element, arguing that the evidence failed to establish that he was acting "in concert" with other Edgemont Criminals. Defendant reads the third element too narrowly: the element requires a defendant to "promote, further, or assist" members of the gang (*Rodriguez, supra*, 55 Cal.4th at p. 1131), and does not include a requirement that he act "in concert" with gang members. Although this element is not satisfied where the defendant acts alone, it is satisfied where the defendant acts *collectively* with gang members. (*Id.*, at p. 1139.)

The evidence in the present case demonstrated that defendant, along with two others, took Jane Doe to the abandoned house, where, Jane Doe later discovered, she was raped by three individuals while unconscious. This conclusion is supported by the fact one gang member's DNA was found in Jane Doe's vagina, while the DNA of Jane Doe and each of the other two gang members was found in used condoms in the house where the rape took place. All three individuals were documented members of the Edgemont Criminals-Dorner Block collective gang. Insofar as the evidence showed Jane Doe was taken to the abandoned house with three African-Americans on but one occasion, the jury properly found defendant acted collectively with two other gang members in the

commission of the crime, furthering, assisting, or promoting the criminal acts of the other gang members.

The evidence is sufficient to support the conviction for active participation in a criminal street gang.

3. *Consecutive Terms for Counts 1 and 2 Were Authorized, But a Consecutive Term for Count 3 Was Barred by Section 654.*

The trial court selected count 2 as the principal term, imposing an aggregate term of 13 years for that count with the gang enhancement. It then imposed a fully consecutive aggregate term of 4 years 8 months for count 1. The court did not state the reasons for its decision to impose fully consecutive terms on the two counts. Defendant argues that the trial court should have stayed the sentence on count 1 pursuant to section 654, because counts 1 and 2 arose from a single act. In addition, multiple terms for the gang enhancement and the substantive active participation in a criminal street gang were improper. We conclude the sentences for counts 1 and 2 must be remanded because the trial court failed to state reasons for its decision to sentence, ostensibly, pursuant to section 667.6, and we reverse the term for count 3 and direct that it be stayed pursuant to section 654.

Section 654 provides that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The section bars multiple convictions and

sentences based on a single act against a single victim. (*People v. Gonzalez* (2012) 211 Cal.App.4th 405, 415-416; *People v. Blevins* (1984) 158 Cal.App.3d 64, 68.)

Whether a course of conduct is a divisible transaction depends on the intent and objective of the actor: “If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006 (*Alvarez*).) The section applies when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction. (*Ibid.*, citing *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

a. Full Consecutive Terms for Counts 1 and 2.

In sex crime cases, even where the defendant has but one objective—sexual gratification—section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished. (*Alvarez, supra*, 178 Cal.App.4th at p. 1006.) The statute (§ 654) literally applies only where multiple punishment arises out of multiple statutory violations produced by the “same act or omission.” (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Thus, if a person rapes a 13-year-old, he can be convicted of both rape and lewd conduct with a child on the basis of that single act, but he cannot be punished for both offenses. (*People v. Siko* (1988) 45 Cal.3d 820, 823.)

However, if the convictions arise from multiple acts committed against the same victim, on the same or on multiple occasions, consecutive sentences are proper. (§ 667.6, subd. (c).) A person who commits separate, factually distinct crimes, even with only one ultimate intent and objective, is more culpable than the person who commits only one crime in the pursuit of the same intent and objective. (*People v. Correa* (2012) 54

Cal.4th 331, 341, citing *People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) Thus, where a defendant broke into the victim's home and committed three separate acts of digital penetration with a short span of time, section 654 did not bar separate punishment for each separate assault. (*People v. Harrison* (1989) 48 Cal.3d 321, 336 (*Harrison*).)

Here, the People argued to the jury that the presence of both defendant's and Jane Doe's DNA on the inside and the outside of the condom showed that he penetrated her once without the condom, then put the condom on and penetrated her again. This constitutes two acts, which may be punished separately pursuant to section 667.6, subdivision (c), even though they were committed in quick succession. (*Harrison, supra*, 48 Cal.3d at p. 336; see also, *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006.)

Section 667.6, subdivision (c), permits the court, in its discretion, to impose fully consecutive terms for multiple sex offenses committed against a single victim on a single occasion. (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 123 (*Pelayo*).) However, the court must provide a statement of reasons for the sentencing choice.⁵ (*People v. Belmontes* (1983) 34 Cal.3d 335, 346-347; *People v. Pena* (1992) 7 Cal.App.4th 1294, 1317; *People v. Reeder* (1984) 152 Cal.App.3d 900, 912, 919, fn. 8.) In the alternative, the court may impose the more lenient sentencing provisions of section 1170.1. (*Pelayo, supra*, 69 Cal.App.4th at pp. 123-124, citing *People v. Jones* (1988) 46 Cal.3d 585, 593; *People v. Belmontes* (1983) 34 Cal.3d 335, 346.)

⁵ Section 667.6, subdivision (d), mandates the imposition of fully consecutive sentences for multiple sex offenses committed against a single victim if the offenses were committed on separate occasions. That situation is not present here, so any authority to impose fully consecutive terms comes from subdivision (c) of section 667.6.

Here, the convictions on both counts 1 and 2 supports an inference that the jury agreed with the People's theory that defendant penetrated Jane Doe more than once. This interpretation gave the court authority to make a sentencing choice to impose an aggregate sentence pursuant to section 1170.1, or to impose fully consecutive terms pursuant to section 667.6, subdivision (c). The court failed to state that it was exercising its discretion to sentence under section 667.6, and neglected to state its reasons for choosing the sentencing option. We must therefore remand the matter to the superior court for resentencing. At that time, the court may exercise its discretion to sentence defendant under either section 1170.1 or 667.6, but must state reasons if it chooses the latter.

b. The Consecutive Term for Count 3 (Active Participation in a Criminal Street Gang) Violated Section 654.

Both counts 1 and 2 were enhanced by consecutive terms based upon the jury's finding that those crimes were committed for the benefit of a criminal street gang. The sexual offenses against Jane Doe constituted the felonious acts which transformed mere gang membership, itself not criminal, into the crime of active participation in a criminal street gang. The court also imposed a consecutive term for count 3, alleging defendant's active participation in a criminal street gang. Defendant claims the term for count 3 violated section 654 and we agree.

To be guilty of active participation in a street gang, the defendant must have promoted, furthered, or assisted in felonious conduct by members of the gang. (§ 186.22, subd. (a).) Section 186.22, subdivision (a) requires that a person commit an underlying

felony with at least one other gang member. (*Rodriguez, supra*, 55 Cal.4th at p. 1134.)

One may promote, further, or assist in any felonious criminal conduct by members of the gang by either aiding and abetting other gang members in committing a felony *or* by directly committing a felony with other gang members. (*Id.*, at p. 1136, italics added.)

Here, the underlying felonies that formed the basis for the conviction for being an active participant in a criminal street gang were counts 1 and 2, each of which carried a gang enhancement allegation (§ 186.22, subd. (b)(1)), found true by the jury. Section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have willfully promoted, furthered, or assisted in any felonious conduct by members of the gang, and (2) the underlying felony that is used to satisfy this element of gang participation. (*People v. Mesa* (2012) 54 Cal.4th 191, 197, relying on *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315 [overruled on a different point in *Rodriguez, supra*, 55 Cal.4th at p.1137]; *People v. Lopez* (2012) 208 Cal.App.4th 1049, 1061-1062.)

Because section 654 requires the imposition of the longest possible term, the sentence for count 3 should be stayed, in light of the longer term imposed on count 2.

DISPOSITION

We modify the sentence to stay the terms imposed for count 3, and we remand for resentencing on counts 1 and 2. Except as modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.